

In the January 13, 2005, Review and Modification of an Award, Judge Klein determined claimant now has a permanent partial general disability of 60.4 percent. The Judge concluded claimant's task loss increased from 12.5 percent to 20.8 percent. The Judge also concluded claimant made a good faith effort to find employment after being released following an August 8, 2002, surgery and, therefore, that claimant's wage loss for purposes of the permanent partial general disability formula was 100 percent. In addition, Judge Klein determined claimant was entitled to receive temporary total disability benefits for the period from August 8, 2002, through October 23, 2002.

Respondent contends Judge Klein erred. Respondent argues claimant did not make a good faith effort to find employment following her August 2002 surgery and that a wage of \$9.95 per hour should be used for purposes of her post-injury average weekly wage. Respondent also contends the imputed post-injury wage is within 90 percent of her pre-injury average weekly wage, which would limit claimant's permanent partial general disability to her whole body functional impairment rating. Furthermore, respondent argues claimant's functional impairment has not changed since the original proceedings in this claim. Consequently, respondent requests the Board to find there has been no change to justify modifying the original award of benefits in this claim or, in the alternative, to reduce claimant's original 56.25 percent permanent partial general disability to her whole person functional impairment, which respondent contends is 15 percent.

Claimant also contends Judge Klein erred. Claimant argues the Judge should have determined that her present permanent partial general disability is 68.75 percent, which is based upon an increased task loss of 37.5 percent and a 100 percent wage loss. Claimant contends she has made a good faith effort to find employment following her last surgery and, therefore, her wage loss should be determined using her actual wages, as Judge Klein did, rather than using an imputed wage. Additionally, claimant maintains she should be awarded temporary total disability benefits for the period from June 10, 2002, when she saw Dr. Paul S. Stein before her August 2002 surgery, through January 7, 2003, when she was released from treatment. Finally, claimant argues the Judge did not correctly calculate the award in this review and modification proceeding.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability in this review and modification proceeding?
2. Is claimant entitled to receive any additional temporary total disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the January 13, 2005, Review and Modification of an Award should be modified.

This is a claim for a neck and upper back injury that claimant sustained while working for respondent on October 20, 1999, as a production manager and press operator. As a result of that accident, claimant had a discectomy and fusion at the C6-C7 level of the cervical spine.

This claim returns to the Board upon the parties' requests to review and modify the initial award entered in this claim by the Board on January 23, 2002. The sole issue presented to the Board in the original appeal was whether claimant had made a good faith effort to retain employment that she had acquired after leaving respondent's employment. The Board, which was later affirmed by the Kansas Court of Appeals, determined claimant had made a good faith effort to retain and find appropriate employment. Accordingly, the Board determined claimant's wage loss for the permanent partial general disability formula of K.S.A. 44-510e was 100 percent as claimant was unemployed when the record closed.

In the initial appeal to this Board, the parties did not dispute Administrative Law Judge Jon L. Frobish's finding that claimant sustained a 15 percent whole body functional impairment as that impairment rating was provided by both Dr. Philip R. Mills and Dr. Pedro A. Murati. In addition, the parties did not challenge the Judge's finding that claimant had sustained a 12.5 percent task loss as that was the only task loss percentage in the record. Accordingly, in the January 23, 2002, Order, the Board averaged the 100 percent wage loss with the 12.5 percent task loss and determined claimant had a 56.25 percent permanent partial general disability.

On January 28, 2002, respondent filed a Post-Award Motion for Review and Modification in which the respondent alleged the Board's January 23, 2002, Order should be modified as claimant had obtained employment. On June 25, 2002, claimant filed an application to review and modify her award, alleging she had sustained increased functional impairment. On January 29, 2003, respondent filed an application to review and modify the January 23, 2002, Order on the basis claimant had returned to work at a comparable wage or, in the alternative, that she had failed to make a good faith effort to find employment. And on June 30, 2004, claimant filed another application to review and modify her award, again alleging that her functional impairment had increased.

Meanwhile, in January 2002 claimant sought additional medical treatment with Dr. Paul S. Stein, the neurosurgeon who performed claimant's discectomy and fusion in 2000. After obtaining an MRI that indicated claimant now had a disk protrusion at C5-C6, Dr.

Stein referred claimant to Dr. John Gorecki for surgery. On August 8, 2002, Dr. Gorecki operated on claimant's neck. After the surgery, Dr. Stein took over claimant's follow-up. Dr. Stein last saw claimant on January 7, 2003.

Suffice it to say there are divergent medical opinions whether claimant now has additional impairment or additional disability following the August 2002 surgery. According to Dr. Stein, claimant now has an additional 14 percent whole body functional impairment due to her neck, which is over and above the initial eight percent claimant had following the first neck surgery. Using the combined values chart set forth in the *AMA Guides*² (4th ed.), the eight percent and 14 percent combine to yield a 21 percent whole person functional impairment.

On the other hand, Dr. Mills, who saw claimant at respondent's attorney's request, believes claimant had a 15 percent whole person functional impairment under the *AMA Guides* (4th ed.) before the second neck surgery and that her impairment rating has not changed. Dr. Mills, however, did also testify that if one were to change the impairment rating, it would change by only two percent. Both Dr. Stein and Dr. Mills analyzed claimant's functional impairment using the *AMA Guides* (4th ed.). Likewise, both doctors concluded claimant's work restrictions and limitations were not changed by her latest bout of neck symptoms and the second surgery.

Claimant's attorney hired Dr. Pedro A. Murati to evaluate claimant. Dr. Murati last examined claimant in February 2003. Dr. Murati concluded claimant had a 15 percent whole person functional impairment after the first neck surgery and that she had sustained an additional 12 percent whole person functional impairment, which combined for a 25 percent whole person functional impairment according to the *AMA Guides* (4th ed.). Moreover, the doctor determined claimant's task loss had increased from 12.5 percent to 37.5 percent.

In September 2004, Dr. Robert L. Eyster examined claimant at respondent's attorney's request. Dr. Eyster concluded claimant had a 15 percent whole person functional impairment under the *AMA Guides* (4th ed.) due to her neck.

Considering the divergent opinions, the Board finds Dr. Stein's functional impairment rating is the most persuasive and that claimant now has a 21 percent whole person functional impairment due to her neck injury and subsequent surgeries.

Claimant has failed to prove she has made a good faith effort to find appropriate employment following January 7, 2003, when Dr. Stein last saw her. In June 2004, the

² American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

parties questioned claimant during a deposition for discovery purposes only. At that time, in the more than the one-year period that she had been released from medical treatment, claimant had applied at about eight different potential employers. During that period, claimant had also declined vocational placement services that respondent had offered. Claimant testified she was told she had a herniated disk in her back but there is no evidence that she could not work. Following the discovery deposition, claimant did contact more potential employers as at the October 13, 2004, review and modification hearing she presented a list of approximately 40 contacts she had made looking for work.

Considering all the facts and circumstances, the Board is unable to find that claimant has proven she has made a good faith effort to find appropriate work. Consequently, the Board must impute a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula set forth in K.S.A. 1999 Supp. 44-510e.

The record contains two opinions from vocational counselors regarding claimant's retained ability to work and earn wages. Claimant's expert witness, Doug Lindahl, concluded claimant could earn up to \$7 per hour, or \$280 per week. Conversely, respondent's expert witness, Dan R. Zumalt, determined claimant could earn an average of \$9.95 per hour, or \$398 per week, performing some type of work in customer service or sales. Considering the opinions of both Mr. Lindahl and Mr. Zumalt, the Board finds claimant retains the ability to earn approximately \$8.50 per hour, or \$340 per week. Comparing \$340 per week to claimant's pre-injury wage of \$477.57, which was part of the parties' stipulations in the original claim, claimant has a wage loss of 29 percent for determining her permanent partial general disability benefits.

The Board is also persuaded by the opinions of Dr. Stein and Dr. Mills that claimant's restrictions did not change due to this latest bout of neck problems and the resulting second surgery. Consequently, claimant's task loss did not change from the 12.5 percent that was found in the Board's January 23, 2002, Order.

Averaging the 29 percent wage loss with the 12.5 percent task loss yields a 21 percent permanent partial general disability, which is also claimant's whole person functional impairment, as indicated above. Accordingly, the January 13, 2005, Review and Modification of an Award should be modified to reduce claimant's permanent partial general disability from 56.25 percent to 21 percent.

Respondent contends the Board should modify claimant's award of permanent partial general disability benefits as of October 28, 2003. Respondent chose that date as it appears to be when Mr. Zumalt spoke with claimant and learned that she was declining vocational assistance. Although a good argument could be made that claimant's good faith

effort to find appropriate employment ended before October 28, 2003, the Board defers to the date selected by respondent.

The final issue to address is whether claimant is entitled to some additional weeks of temporary total disability benefits. In the January 13, 2005, Review and Modification of an Award, Judge Klein awarded claimant additional temporary total disability benefits for the period of August 8, 2002, through October 23, 2002. But claimant contends she should receive temporary total disability benefits from June 10, 2002, when she saw Dr. Stein before her August 2002 surgery, through January 7, 2003, when Dr. Stein last saw claimant. The Board agrees with Judge Klein as claimant failed to prove she was temporarily and totally disabled from working during the additional weeks requested. Moreover, Dr. Stein testified he released claimant to return to work on October 23, 2002, with some restrictions. In summary, claimant failed in satisfying her burden of proof on this issue.

The Board adopts the findings set forth by Judge Klein to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the January 13, 2005, Review and Modification of an Award entered by Judge Klein to reduce claimant's permanent partial general disability from 56.25 percent to 21 percent.

Kelly A. Cavender is granted compensation from PIP Printing, Inc., and its insurance carrier for an October 20, 1999, accident and resulting disability. Based upon an average weekly wage of \$477.57, Ms. Cavender is entitled to receive 40.57 weeks of temporary total disability benefits at \$318.40 per week, or \$12,917.49.

For the period ending August 7, 2002, Ms. Cavender is entitled to receive 105.43 weeks of permanent partial general disability benefits at \$318.40 per week, or \$33,568.91, for a 56.25 percent permanent partial general disability.

For the period from August 8, 2002, through October 23, 2002, Ms. Cavender is entitled to receive 11 weeks of temporary total disability benefits at \$318.40 per week, or \$3,502.40.

For the period from October 24, 2002, through October 27, 2003, Ms. Cavender is entitled to receive 52.71 weeks of permanent partial general disability benefits at \$318.40 per week, or \$16,782.86, for a 56.25 percent permanent partial general disability.

Beginning October 28, 2003, Ms. Cavender's permanent partial general disability decreases to 21 percent, leaving no additional permanent disability benefits due and owing due to the accelerated payout provisions of the Workers Compensation Act.³

Accordingly, Ms. Cavender is entitled to a total award of \$66,771.66, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ See *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).